CHAN YOCK CHER

v.

CHAN TEONG PENG

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
DENIS ONG JCA
KC VOHRAH JCA
[CIVIL APPEAL NO: J-02-571-1999]
7 JULY 2003

COMPANY LAW: *Shares - Sale of shares - Transfer - Sale of shares by director and majority shareholder - Order of court that sale was valid and that purchaser was beneficial owner of shares - Whether company secretary duty bound to effectuate transfer*

CONTRACT: *Specific performance - Sale and purchase of shares - Options - Purchaser exercising option to transfer pledged shares to himself - Whether enforceable - Whether entitled to transfer of shares - Summary judgment - Rules of High Court 1980, O. 81 r. 1(1)(a)*

The appellant is a director and the controlling shareholder in the companies Tiong Kwai Realty Company Sdn Bhd ('CTK') and Son Huut Plantation Sdn Bhd ('SHP'). By an agreement dated 16 December 1995, the appellant agreed to sell 8,039 CTK shares to the respondent for RM270,000 and in furtherance thereof: (i) undertook to obtain CTK's approval for the transfer of the shares within three months; (ii) pledged and deposited 32,630 SHP shares with a stakeholder to guarantee his due performance to transfer the CTK shares to the respondent; and (iii) gave the respondent the option of claiming the refund of the RM270,000 or disposing of the 32,630 SHP shares to himself, should the transfer of the CTK shares fail or be aborted ('cl. 7b').

The appellant failed to transfer the 8,039 CTK shares to the respondent within the stipulated period, whereupon summary judgment was granted to the respondent in respect, *inter alia*, of his prayer for declaration that he was the registered and beneficial shareholder of the 32,630 SHP shares ('prayer 1(a)'). The appellant appealed and before the appellate court questions arose as to: (i) whether the appellant could avoid the agreement on ground of uncertainty; and (ii) whether the company secretary of SHP could refuse to effectuate the transfer of the 32,630 SHP shares to the respondent.

Held:
Per Mokhtar Sidin JCA

[1] Under cl. 7 of the agreement, it is clear that if the appellant failed to meet his obligation under sub-clause (a), then the respondent would be given the choice under sub-cl. (b) to transfer the 32,630 shares to himself or his nominee or in the alternative demand payment of the RM270,000. It is also clear that the choice was only given to the respondent and not to the appellant. The respondent was therefore within his right to request the registration of the 32,630 SHP shares in his name and refuse the refund of the RM270,000. Clause 7(b) is obvious and simple and there is no ambiguity about it.

[2] Both parties especially the appellant knew the value of the 32,630 shares at the time of the signing of the agreement. Being private companies, the value of the shares of the companies was never published but depended on their assets. As such, at the time of the signing of the agreement, both parties came to an agreement that the value of 8,039 CTK shares for which the respondent paid RM270,000 was equivalent to the value of 32,630 SHP shares. That being so, the appellant cannot now turn around and say that the value was uncertain.

[3] There was no hindrance for the appellant to sell the 8,039 CTK shares to the respondent as the appellant was a director and majority shareholder in the company. Clearly, the reason for the appellant not transferring the CTK shares was not because approval could not be obtained but because he wanted to contract out of the agreement.

[3a] As the 32,630 SHP shares were deposited with duly executed transfer forms, the appellant must have obtained the necessary approval of the Board of Directors of SHP to do so. Thus, when the appellant delivered the shares and the duly executed transfer forms to the stakeholder, the stakeholder and the respondent must have accepted them as a security free from all hindrances.

[4] Whilst the company secretary was not a party to the present action, a company secretary nonetheless must act according to the instruction of the Board of Directors. The appellant herein was at the material time the director and controlling shareholder of SHP. Since the learned judge had made an order in respect of prayer 1(a), that order was binding on SHP, as well as its directors, shareholders and officials including the company secretary, and they must give effect to the order.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah seorang pengarah dan pemegang saham terbesar dalam syarikat-syarikat Tiong Kwai Realty Company Sdn Bhd ('CTK') dan Son Huut Plantation Sdn Bhd ('SHP'). Melalui perjanjian bertarikh 16 Disember 1995, perayu bersetuju menjual 8,039 saham CTK kepada responden dengan harga RM270,000, dan berikutnya: (i) berjanji untuk mendapatkan persetujuan CTK untuk pindahmilik saham tersebut dalam masa tiga bulan; (ii) menyandar dan menyerahsimpan 32,630 saham SHP dengan seorang stakeholder sebagai jaminan bahawa beliau akan melaksanakan pindahmilik saham CTK kepada responden; dan (iii) memberi pilihan kepada responden sama ada untuk menuntut bayaran balik RM270,000 atau memindahmilik 32,630 saham SHP kepada dirinya jika pindah milik saham CTK tidak dapat dilaksana dalam tempoh yang ditetapkan.

Perayu gagal melaksanakan pindahmilik 8,039 saham CTK kepada responden dalam masa yang ditetapkan, berakibat responden memperoleh penghakiman ingkar, antara lain, bagi permohonan untuk perisytiharan bahawa beliau adalah pemegang saham berdaftar dan benefisial bagi 32,630 saham-saham SHP berkenaan ('permohonan 1(a)'). Perayu merayu dan di mahkamah rayuan persoalan-persoalan telah berbangkit: (i) sama ada perayu boleh mengelak diri dari ikatan perjanjian atas alasan bahawa ia adalah samar; (ii) sama ada setiausaha syarikat SHP boleh menolak dari menyempurnakan pindah milik 32,630 saham SHP kepada responden.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Di bawah fasal 7 perjanjian, ianya jelas bahawa jika perayu gagal memenuhi obligasinya di bawah fasal kecil (a), maka responden diberi pilihan di bawah fasal kecil (b) sama ada untuk memindahmilik 32,630 saham-saham berkenaan kepadanya atau menuntut bayaran RM270,000. Adalah juga jelas bahawa pilihan tersebut hanya diberi kepada responden dan tidak kepada perayu. Responden dengan itu bertindak mengikut haknya apabila menuntut pendaftaran 32,630 saham SHP kepada namanya dan menolak pembayaran balik RM270,000. Fasal 7(b) adalah ringkas dan jelas dan tidak diselubungi oleh apa-apa kesamaran.

[2] Kedua-dua pihak terutama perayu tahu mengenai nilai 32,630 saham itu semasa memetrai perjanjian. Sebagai syarikat persendirian nilai saham-saham syarikat tidak dihebahkan tetapi bergantung kepada aset-aset syarikat. Oleh itu, sewaktu menandatangani perjanjian, kedua-dua pihak semestinya bersetuju bahawa nilai 8,039 saham CTK untuk mana

responden telah membayar RM270,000 adalah bersamaan dengan nilai 32,630 saham SHP. Dengan yang demikian, perayu tidak boleh kini berpusing dan berkata bahawa nilai saham-saham tersebut adalah samar.

[3] Tidak ada halangan bagi perayu untuk menjual 8,039 saham-saham CTK kepada responden oleh kerana beliau adalah seorang pengarah dan pemegang saham terbesar dalam syarikat. Adalah jelas bahawa alasan untuk tidak memindahmilik saham CTK tersebut bukanlah kerana ketiadaan izin tetapi kerana perayu hendak menarik diri dari ikatan perjanjian.

[3a] Oleh kerana 32,630 saham-saham SHP tersebut diserahsimpan bersama-sama dengan borang pindahmilik yang siap disempurnakan, perayu semestinya telah mendapat kebenaran Lembaga Pengarah SHP untuk berbuat demikian. Maka itu, apabila perayu menyerahkan saham-saham dan borang pindahmilik tersebut kepada stakeholder, ianya diterima oleh stakeholder dan responden sebagai suatu jaminan yang bebas dari apa-apa halangan.

[4] Walaupun setiausaha syarikat bukan merupakan pihak kepada tuntutan di sini, namun seorang setiausaha syarikat perlu bertindak mengikut arahan Lembaga Pengarah. Perayu di sini adalah pada waktu material seorang pengarah dan pemegang saham terbesar SHP. Oleh kerana hakim yang bijaksana telah membuat perintah mengenai Permohonan 1(a), perintah tersebut adalah mengikat SHP, ahli-ahli Lembaga Pengarah, pemegang-pemegang saham serta pegawai-pegawainya termasuk setiausaha syarikat dan mereka perlu melaksanakan perintah tersebut.

Rayuan ditolak.]

Case(s) referred to:

Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***

Tan Sri Abdul Aziz Zain & Anor v. Development & Commercial Bank Bhd [1993] 3 CLJ 62 HC ***(refd)***

Tong Kok Chai v. Ocean Front Pte Ltd & Anor [1988] 3 MLJ 125 HC ***(refd)***

United Overseas Land Ltd v. Loke Hong Kee (S) Pte Ltd [1981] 1 MLJ 51 ***(refd)***

Yap Mang Siew & Ors v. Leong Hum [1998] 3 CLJ Supp 513 HC ***(aff)***

For the appellant - Ng Chew Hor (Steven Chua Quek Seng); M/s KN Fan & Co
For the respondent - Tho Kam Chew; M/s Gulam & Wong

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-15-1998(2)]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

In this appeal the appellant (the defendant in the court below) entered into a written agreement dated 16 December 1995 with the respondent (the plaintiff in the court below) whereby the respondent agreed to purchase from the appellant 8,039 ordinary shares in Chan Tiong Kwai Realty Company Sdn Bhd (a private limited company) (hereinafter referred to as "CTKRCSB" only) for a total consideration of RM270,000 subject to the approval of the board of directors of the said company and upon the terms and conditions therein. It is not disputed that the appellant is the beneficial and registered owner of those 8,039 shares. It is also not disputed that the respondent paid the full purchase price of RM270,000 evidenced by the receipt issued by the appellant. Clauses 5 and 6 of the agreement provide that the appellant be given three months from the date of signing the agreement to get the approval of the board of directors of CTKRCSB for the transfer of those 8,039 shares to the nominee for the respondent by the name of Chan Ai Lian. Clause 3 of the agreement provides the pledging of 32,630 shares in Son Huut Plantation Sdn Bhd (hereinafter referred to as "SHPSB" only) to secure the RM270,000 paid by the respondent pending the completion of the transfer of 8,039 shares of CTKRCSB to the respondent. The 32,630 shares of SHPSB and the relevant transfer forms duly executed by the appellant were deposited with Messrs Gan & Lim as stakeholder. Clause 7(b) of the agreement gives the respondent the option either to claim the refund of RM270,000 paid or the disposal of 32,630 SHPSB shares to himself in the case that the appellant was unable to transfer and register the 8,039 CTKRCSB shares in the name of Chan Ai Lian within the stipulated period. It is not disputed that the appellant failed to obtain the approval of the board of directors for the transfer of the 8,039 CTKRCSB shares to Chan Ai Lian. With the failure the respondent on 6 May 1997 gave notice to the appellant that he would be exercising the option under cl. 7(b) that the 32,630 SHPSB shares be disposed to him. The shares and the transfer forms were delivered to the company secretary of SHPSB for those shares to be registered in the name of the respondent. The company secretary apparently refused to register the 32,630 SHPSB shares in the name of the respondent. The respondent then filed the present action either to compel the transfer and to register the 8,039 CTKRCSB shares in the name of Chan Ai Lian or direct the transfer and register the 32,630 SHPSB shares in the name of the respondent.

In his statement of claim, the respondent seeks the following declarations:

(1) Specific performance of the said Agreement ie, EITHER

(I) (a) a declaration that CHAN AI LIAN and/or the Plaintiff's nominee is the registered and beneficial owner of all the 8,039 ordinary shares of RM1.00 each in CHAN TIONG KWAI REALTY COMPANY SENDIRIAN BERHAD.

(b) that the Defendant do forthwith deliver the original share certificates and the transfer forms duly executed and attested of the said 8,039 shares to the Plaintiff or his solicitors and in the event of failure neglect or refusal to do so, the Deputy Registrar or the Senior Assistant Registrar be empowered to execute the share transfer forms and the Defendant shall bear all costs stamp fee expenses whatever relating thereto; and

(c) that the said Company's Company Secretary do register CHAN AI LIAN and/or the Plaintiffs nominee as the legal and beneficial owner of all the said 8,039 shares.

OR IN THE ALTERNATIVE

(II) (a) a declaration that the Plaintiff and/or his nominees is the registered and beneficial shareholders of all the 32,630 ordinary shares of RM1.00 each in Son Huut Plantation Sdn. Bhd.

(b) that the Company Secretary of SON HUUT PLANTATION SDN. BHD. do register the Plaintiff and/or his nominees as the legal and beneficial owner of all the said 32,630 shares.

The appellant in his statement of defence and counterclaim admitted that he had entered into the written agreement dated 16 December 1995. The appellant also admitted that he was not able to obtain the approval of the board of directors of CTKRCSB to transfer the 8,039 CTKRCSB shares to Chan Ai Lian, the respondent. He added that he owned only 13,175 CTKRCSB shares and not the whole 30,002 shares as alleged by the respondent. For the sake of clarity the gist of the appellant's defence and counterclaim read:

10. On paragraph 9 of the Statement of Claim and save and except for the letter dated 29 August 1997, the Defendant denies the allegations contained in paragraph 9 thereof. The Defendant avers that the Plaintiff having knowledge that the Defendant could not obtain the approval of the Board of Directors, the Plaintiff elected to recover the said sum of RM270,000.00 by attempting to dispose of the 32,630 ordinary shares in Son Huut Plantation Sdn. Bhd. ("the Son Huut Shares") which had been deposited under the Agreement as collateral to secure the repayment of the said sum of RM270,000.00.

11. The Defendant states that:

(a) up till the date of said letter dated 29 August 1997, the Plaintiff did not demand for further performance of the intended sale of the Sale Shares nor the original shares to transfer forms and had accepted the determination of the intended sale and transfer of the Sale Shares;

(b) the Plaintiff had through his original solicitors by letter dated 6 May 1997 made the election pursuant to clause 7 of the Agreement and had thereby elected to no longer proceed with the intended sale and transfer of the Sale Shares.

The Defendant states that the Plaintiff has made an election not to proceed with the intended sale and transfer of the Sale Shares and is estopped from withdrawing his stand.

12. Further and/or in the alternative, the Defendant contends that:

(a) the intended sale and transfer of the Sale Shares is strictly conditional upon the approval of the Board of Directors being obtained within three (3) months from the date of the Agreement (by 16.3.1996), that is that the procurement of the said approval of the Board of Directors is a condition precedent to the intended sale and transfer of the Sale Shares; and

(b) time to obtain the said approval of the Board of Directors within the three (3) month' period shall be of the essence of the contract,

and the approval was not obtained within the stipulated period of three months thereby rendering the Agreement as determined, unenforceable and void.

13. Further and/or in the alternative, the Defendant states that the intended sale and transfer of the Sale Shares covenanted in the Agreement is:

(a) void for uncertainty as the material term with regards to the pre-emption rights of the other shareholders of CTKRCSB to purchase the Sale Shares conferred on the other shareholders under the Articles of Association of CTKRCSB was not discussed or agreed between the Plaintiff and the Defendant; and/or

(b) further conditional upon the other shareholders of CTKRCSB agreeing to waive their pre-emption rights (to purchase the Sale Shares), which condition has yet to be fulfilled.

The Defendant will refer to all the terms of the Articles of Association of CTKRCSB at the trial of this action for its full terms and effects.

14. Alternatively and/or in addition to the matters stated above, the Defendant avers that the Plaintiff had been guilty of undue delay in pursuing the remedy for specific performance and thus should not be allowed to do so, particularly having regard to the expiry of the three month period on 16.3.96 and the subsequent issuance of the Plaintiffs solicitors' letter dated 6.5.97.

15. Further and/or alternatively, the Defendant avers that subsequently on or about 24 August 1996, the Plaintiff had agreed not to pursue the Agreement if the Defendant transfers approximately 21.98% of the share equity in CTKRCSB to the Plaintiffs son, namely one Chan Kok Thin @ Chan Kok Cheng, for the consideration as agreed which the Defendant had effected.

...

18. Further and/or in the alternative, the Defendant avers and contends that:

    a. the Son Huut Shares were deposited with M/s Gan & Lim strictly as a collateral for the repayment of the sum of RM270,000.00 in the event that the Plaintiff chooses to recover the payment of the said sum of RM270,000.00;

    b. the Plaintiff had by his actions, in particular the election made pursuant to his solicitors' letter dated 6.5.1997, in effect elected to recover the said sum of RM270,000.00; and

    c. the Defendant had through his solicitors' letter dated 22 September 1997, namely M/s WJ Chen & Company, tendered to the Plaintiffs solicitors, M/s Gulam & Wong, the repayment of the said sum of RM270,000.00 but the same was refused and rejected by the Plaintiff.

19. Further and/or in the alternative, the Defendant avers and contends that the purported option as provided in clause 7(b) of the Agreement was and is void for uncertainty, in that a number of material terms for the disposal of the Son Huut Shares and not been discussed or agreed upon between the Plaintiff and the Defendant and the material terms are:

    (a) the sale price for the disposal of the Son Huut Shares;

    (b) the time for the payment of the sale price of the Son Huut Shares in the event of a successful disposal;

    (c) the procurement of the consent of the other shareholders of Son Huut Plantation Sdn Bhd to waive their pre-emption rights (to purchase the Defendant's shares in Son Huut Plantation Sdn Bhd) provided under the Articles of Association of Son Huut Plantation Sdn Bhd;

(d) the procurement of the approval of the board of directors of Son Huut Plantation Sdn Bhd to the intended disposal and subsequent transfer and registration of the Son Huut Shares pursuant to the Articles of Association of Son Huut Plantation Sdn Bhd.

The Defendant will refer to all the terms of the Articles of Association of Son Huut Plantation Sdn Bhd at the trial of this action for its full terms and effects.

20. In addition thereto, the Defendant contends that the purported exercise of the option by the Plaintiff is invalid and could not be taken as to transfer the Son Huut Shares to the Plaintiff or his nominee.

...

22. Further and/or in the alternative the Defendant avers and contends that:

(a) the Defendant is only the registered and beneficial owner of 32,630 ordinary shares in Son Huut Plantation Sdn Bhd out of a total of 72,509 ordinary shares;

(b) the Defendant being only a minority shareholder could not have procured the consent of the shareholders to waive their pre-emption rights;

(c) the pre-emption rights to purchase the Son Huut Shares conferred on the other shareholders are their prerogative which they cannot in law be forced to waive;

(d) the Defendant is only one out of three (3) directors serving the board of directors of Son Huut Plantation Sdn Bhd;

(e) the Defendant not being in control of the board of directors of Son Huut Plantation Sdn Bhd could not have procured the approval of the board of directors for the disposal, transfer and registration of the Son Huut Shares.

...

28. The Defendant had by his solicitors' letter dated 31.10.97 demanded from M/s Gan & Lim the return of the original share certificates to the Son Huut Shares but the said solicitors have neglected and/or refused to return the same.

29. By reason of the refusal of the said Plaintiffs solicitors to return the said share certificates, the Defendant has been put to a great deal of inconvenience and has suffered loss and damage.

30. Wherefore the Defendant counterclaims against the Plaintiff for:

(a) a declaration that the option provided in clause 7(b) of the agreement dated 16.12.1995 is null and void and consequently, the purported exercise of the same is invalid;

(b) an order that the Plaintiff and/or M/s Gan & Lim, Advocates & Solicitors, Johor Bahru deliver or caused to be delivered to the Defendant the original share certificates to 32,630 ordinary shares in Son Huut Plantation Sdn Bhd;

(c) general damages;

...

On 30 May 1998 the respondent filed his statement of reply and defence to counterclaim. In his reply the respondent stated that at all material times the appellant was the beneficial owner of 30,002 ordinary shares of the total 50,002 issued and paid up shares in CTKRCSB. The respondent further pleaded that on 25 January 1997, the defendant orally pleaded with the respondent to allow the former a further period of three months to complete the performance of his obligations. On the failure of the appellant to perform, the respondent on 6 May 1997 instructed his solicitors, Messrs Gan & Lim, to inform the appellant by letter that the respondent is exercising his option to dispose the 32,630 SHPSB shares to himself. The respondent denied the appellant's allegation that there was an agreement on 24 September 1996 for the respondent not to exercise the option under cl. 7(b) if the appellant transferred 21.98% equity in CTKRCSB to the respondent's son. The respondent added if there was such an agreement, that agreement would constitute a separate and independent agreement from the agreement dated 16 December 1995. The respondent admitted that his solicitors received the cheque for RM270,000 together with the letter dated 26 September 1997 from the appellant's solicitors but the cheque was returned to the appellant because by then the respondent had already exercised his option under cl. 7(b). The respondent contended that the 32,630 SHPSB shares were deposited with the stakeholder as collaterals to ensure that the appellant do transfer the 8,039 CTKRCSB shares into the name of the respondent's nominee. In the reply, the respondent stated that the appellant is the director of SHPSB and the controlling shareholder of that company. The other directors are the children of the appellant and they are the nominal shareholders holding the shares on trust for the appellant.

On 16 June 1998, by way of summons in chambers, the respondent applied for summary judgment under O. 81 r. 1(1)(a) in accordance with the minutes which prayed, *inter alia*, for the following:

(a) a declaration that the plaintiff and/or his nominees are the registered and beneficial shareholders of all 32,630 ordinary shares of Son Huut Plantation Sdn Bhd;

(b) that the company secretary of Son Huut Plantation Sdn Bhd do register the plaintiff and/or his nominees as the legal and beneficial owner of all the said 32,630 shares;

(c) damages for breach of contract in addition to the specific performance to be assessed by the Senior Assistant Registrar.

The learned judge allowed the application by the respondent and entered judgment on prayers (a) and (c) as stated above but refused prayer (b) on the ground that the company secretary was not made a party in this proceeding.

In her judgment, the learned judge found that the 32,630 SHPSB shares and the relevant transfer forms which were duly executed by the appellant were placed with Messrs Gan & Lim as stakeholder pending the transfer of the 8,039 shares in CTKRCSB to Chan Ai Lian (the nominee for the respondent). It was pending because the approval of the board of directors had to be secured within three months. Under cl. 7(b) of the agreement it was provided that if the 8,039 CTKRCSB shares were not transferred to Chan Ai Lian within the stipulated period then the respondent had the option either to dispose the 32,630 SHPSB shares to himself or the request for the return of the RM270,000 being the purchase price of the 8,039 CTKRCSB shares. There was no dispute that on 6 May 1997, the respondent through his solicitors gave notice to the appellant that he was exercising the option to dispose the 32,630 SHPSB shares to himself pursuant to cl. 7(b) of the agreement. In accordance with the same clause the respondent's solicitors forwarded the 32,630 shares and the duly executed transfer forms to the company secretary of SHPSB for the registration of the respondent's name in the share scripts. The company secretary refused to register the respondent's name in the share scripts.

We have gone through the record and the judgment of the learned trial judge and we are of the view the learned judge was right in allowing the respondent's application for summary judgment for prayers (a) and (c) of the application. Anyway, we have our reservations in the learned judge's refusal to allow the respondent's application for prayer (b).

Before proceeding further, it is better for us to cite cls. 5-7 of the agreement dated 16 December 1995 which is the issue in this appeal, which provide:

5. The Second Party hereby agrees and undertakes to proceed diligently to instruct the Secretary of the said Company to issue the requisite notices to the shareholders of the said Company in respect of the intended sale of the said 8039 share by the Second Party to Chan Ai Lian or to take such other requisite steps to obtain the approval of the Board of Directors of the said Company for completing the transfer of the 8039 shares to CHAN AI LIAN.

6. The Second Party covenants to obtain the said approval of the Board of Directors of the said Company within three (3) months from the date of this Agreement.

7. Upon the expiry of the said period of three (3) months in clause 6 above:

(a) if the said 8039 shares in the said Company have been duly transferred to Chan Ai Lian, Gan & Lim shall return the said 32,630 shares (share certificates) and the four (4) transfers executed by the Second Party to the Second Party and the transaction herein shall be considered duly completed;

(b) if the said 8039 shares in the said Company have not been transferred to Chan Ai Lian for any reason whatsoever, the First Party may elect to dispose of the said 32,630 shares to himself or to whoever the First Party may deem fit and proper. The First Party may elect to claim a refund of the said RM270,000.00 from the Second Party.

From the evidence before us it is not disputed that the appellant failed to meet his obligations under the above-stated clauses in that the 8,039 CTKRCSB shares purchased by the respondent were never transferred to Chan Ai Lian within the stipulated period and the extended period as agreed between the parties. The reason cited by the appellant in not registering the 8,039 CTKRCSB shares in the name of Chan Ai Lian was that he was unable to procure the approval of the board of directors of CTKRCSB. Clauses 3 and 4 of the agreement provide:

3. The Sale and Purchase of the said 8039 shares in the said Company is subject to the approval of the Board of Directors of the said Company and the regulations of the said Company and, since the First Party has paid the said sum of Ringgit Malaysia Two Hundred and Seventy Thousand (RM270,000.00) only to the Second Party in advance, pending the said approval, the Second Party hereby pledges the following 32,630 (Thirty-Two Thousand Six Hundred and Thirty) ordinary shares (hereinafter referred to as "the said 32,630 shares") in SON HUUT PLANTATION SDN. BHD. as a collateral to secure the said payment of RM270,000.00 pending the completion of the transfer of the said 8039 shares in the said Company to Chan Ai Lian:

Share Certificate No.		No. of Shares
(i)	6	1
(ii)	13	1,000
(iii)	19	3,054
(iv)	23	28.575
Total	4	32,630

4. Upon the execution hereof, the Second Party shall execute four (4) transfers on Form 32A in escrow and deliver the four (4) transfers together with the above four (4) share certificates No. 6, 13, 19 & 23 to Gan & Lim, to hold the same as stakeholders.

Before us and in the court below, the appellant raised the issue of the letter dated 22 September 1997 whereby the former solicitors for the appellant sent a cheque for RM270,000 as refund to the respondent. The respondent refused to accept the refund and returned the cheque to the appellant on the ground that the respondent by a letter dated 6 May 1997 had already exercised his option to dispose the 32,630 shares to himself as provided for by cl. 7(b) of the agreement. From the dates stated it is clear to us that the notice of option was done on 6 May 1997 which was about fcur months before the appellant's former solicitors forwarded the refund, ie, on 22 September 1997. In fact, on 29 August 1997 the respondent's present solicitors, Messrs Gulam & Wong, sent a letter to the appellant asking the appellant within seven days to meet his obligations under cl. 7(a) to have the 8,039 CTKRCSB shares registered in the name of Chan Ai Lian. There was no response from the appellant indicating that the appellant refused or failed to meet the obligations under cl. 7(a). This was strengthened by the letter dated 22 September 1997 from the appellant's former solicitors tendering by way of a cheque, the refund of the RM270,000. Under cl. 7 it is clear to us that if the appellant failed to meet his obligations under sub-cl. (a), then the respondent would be given the choice under sub-cl. (b) to transfer the 32,630 shares to himself or to any person he wishes or in the alternative demands the repayment of the RM270,000. It is clear the choice is given only to the respondent and not to the appellant. The appellant could not, in our view, force the respondent to choose which of the alternative he should exercise. The appellant has no say at all. The respondent was within his right to request the registration of the 32,630 SHPSB shares in his name and refuse the refund of the RM270,000.

The learned counsel for the appellant submitted that the respondent could not exercise the option because cl. 7(b) is uncertain and ambiguous. With the greatest respect to the counsel, cl. 7(b) is in our view, so obvious and simple and there is no ambiguity about it. The choice is given to the respondent for taking the risk of advancing the sum of RM270,000 to purchase the 8,039 CTKRCSB shares. By comparing the amount of shares in the two companies it is obvious to us that at the time of signing the agreement the value of CTKRCSB shares was higher than the SHPSB shares. In our opinion, the respondent was given the option because there was a likelihood that the value of 32,630 SHPSB shares might not be RM270,000. There is no merit in the submission of the appellant that cl. 7(b) is uncertain and ambiguous.

The learned counsel for the appellant further submitted that the 32,630 SHPSB shares were pledged as collateral to secure the sum of RM270,000. We are unable to accede to this submission. Clause 3 of the agreement made it clear that those shares were pledged to secure the performance by the appellant to transfer and register the 8,039 CTKRCSB shares in the name of Chan Ai Lian. It should be noted that the agreement in the present appeal is not a loan agreement but a sale and purchase agreement in respect of the sale of 8,039 shares by the appellant to the respondent. Both parties recognised the fact that there were obstacles and difficulties in respect of the sale as stipulated in cls. 1, 2, 3, 5 and 6 of the agreement. For that reason cl. 7 was inserted to secure the due performance by the appellant in the case be could not perform.

The appellant's counsel also submitted that the value of 32,630 SHPSB shares were not stated in the agreement and as such the agreement is void because the term is uncertain. Upon reading the agreement as a whole, it is obvious to us that the parties to the agreement especially the appellant knew the value of those shares at the time of signing the agreement. Bearing in mind that the two companies are private companies and are not listed, the value of each share was never published. The value of the shares of the companies depended on the assets of the companies. As such at the time of signing of the agreement both parties came to an agreement that the value of 8,039 CTKRCSB shares for which the respondent paid RM270,000 was equivalent to the value of 32,630 SHPSB shares. Thus, at the time of signing the agreement both parties accepted the fact that the value of 8,039 CTKRCSB shares was equal to 32,630 SHPSB shares which was RM270,000. The appellant cannot turn around now and say that the value was uncertain. If the value of the shares fluctuates after the signing of the agreement it is not the concern of this court. This court is only concerned with the value of those shares at the signing of the agreement which the parties agreed that RM270,000 would purchase 8,039 CTKRCSB shares or 32,630 SHPSB shares. The parties agreed to that value at the time of signing

the agreement and this the appellant signed with open eyes. We wish to point out that at the time of signing the agreement, the appellant was the best person to know of the value of both the CTKRCSB shares and the SHPSB shares since he was the controlling shareholder of both companies, which was not denied.

The learned judge in her judgment commented that the value of the shares in both companies went up after the agreement. It is fortunate for the respondent that the value went up. Bearing in mind that the RM270,000 injected by the respondent might help to increase the value of those shares we are of the view that the appellant was also fortunate to find the value of the shares of both companies had gone up. Certainly, it is not a ground for which the appellant to contract out of the agreement.

To support his contention that the agreement is void because of uncertainty, the appellant's counsel cited s. 30 of the Contracts Act and the decisions in *Tong Kok Chai v. Ocean Front Pte Ltd & Anor* [1988] 3 MLJ 125; *United Overseas Land Ltd v. Loke Hong Kee (S) Pte Ltd* [1981] 1 MLJ 51; *Tan Sri Abdul Aziz bin Zain & Anor v. Development & Commercial Bank Bhd* [1993] 3 CLJ 538 and *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738. Apparently, the authorities cited did not help the appellant. In *Ng Ah Ba & Ors v. Ramanda Sdn Bhd*, the respondent sued the appellants for specific performance. The first four appellants purchased a piece of land at Seberang Perai and registered it in the name of the fifth appellant. Before it was registered in the name of the fifth appellant, the first four appellants entered into an agreement to sell the said land to the respondent. After the land was registered in the name of the fifth appellant, the fifth appellant entered into a fresh agreement to sell the said land to the respondent for the sum of RM3,253,966.85 and an undertaking to execute a valid and registrable memorandum of transfer in favour of the respondent. The fifth appellant defaulted. The respondent after fulfilling its obligations under the agreement brought summary proceedings for specific performance under O. 81 of the Rules of the High Court against the appellants. The High Court allowed the application and found that there was no triable issue. The appellants appealed against that decision to the Court of Appeal and cited that there was a conspiracy between the first appellant, the appellant's solicitors and the respondent's manager in respect of the purchase price which was alleged to be RM4.3 million as agreed under the first agreement was concealed from the other appellants. As such there were triable issues. The Court of Appeal found that the price of RM4.3 million in the first agreement was brought down to RM3,253,966.85 as stated in the latest agreement after negotiations by the parties. The court found there was no conspiracy or fraud and dismissed the appeal by the appellants.

In *United Overseas Land Ltd v. Loke Hong Kee (S) Pte Ltd*, the respondents under a written agreement agreed to carry out and complete certain building works under the supervision and to the satisfaction of the appellants' architect. By a supplemental agreement between the parties, the appellants were "at liberty to determine the employment of the respondents under the main contract forthwith by notice in writing" upon the recommendation of the architect in writing, should he be of the opinion that the respondents had failed to maintain the progress of works as specified in the schedule to the main agreement. Pursuant to the supplemental agreement, the architect on 1 March 1977 made recommendations that the employment of the respondents under the main contract be determined because in his opinion the respondents were not carrying out the works expeditiously and with diligence. The appellants acting on that recommendation issued the termination letter dated 1 March 1977 to the respondents. The Court of Appeal held:

> (1) on a careful consideration of the terms of the supplemental agreement, the intention of the parties to it was that the appellants could determine the respondents' employment under the main contract if, *inter alia*, the architect was of the *bona fide* opinion that the progress of the works specified in the third schedule annexed to the supplemental agreement was unsatisfactory and the architect recommended in writing to the appellants to determine the employment;
>
> (2) however stringent such a term may be, when it comes to be enforced the courts have declared that their duty is in such cases to ascertain and give effect to the intention of the parties as evidenced by the agreement and if a term is clear and unambiguous the court is bound to give effect to it without stopping to consider how far it may be oppressive or not;

From our observations, the two cases referred above supported the respondent in the present appeal. The other authorities cited by the appellant were not relevant to the present appeal.

Perusing the affidavits filed by the parties, it is clear to us that at the time of signing of the agreement, the appellant was the holder of 30,002 CTKRCSB shares out of the total 50,002 issued shares. The changes in the equity holding was only made pursuant to a family agreement dated 24 August 1996 and directors' resolutions dated 17 October 1996. In respect of SHPSB shares it was not revealed what was the appellant's holding at the time when the agreement was signed, but it is obvious to us that the equity holding was changed pursuant to the agreement dated 24 August 1996 which we have mentioned earlier. As on 5 August 1997, the appellant was the beneficial owner of 32,630 shares in SHPSB out of the total of 72,509 issued shares. In respect of CTKRCSB, we agreed with the respondent and the learned judge that there

was really no hindrance for the appellant to sell 8,039 CTKRCSB shares to the respondent because at the time when the agreement was signed the appellant was a director and the majority shareholder being the holder of 30,002 shares out of 50,002 shares. The reason given by the appellant that he was holding 20,000 shares on trust was only an excuse to contract out of the agreement. There was no evidence to show that he had requested for a directors' meeting to get approval to sell the 8,039 CTKRCSB shares to the respondent. From the record it was revealed that at the time when the agreement was signed, CTKRCSB was in need of capital injection. They could not raise the money because the properties of CTKRCSB had been charged to UMBC (see p. 262 of the record). It was not possible for CTKRCSB to borrow without any security. The appellant then resorted to selling the 8,039 CTKRCSB shares to the respondent for the sum of RM270,000.

There is no evidence to show the other shareholders of CTKRCSB were able to come up with that money at the time of the signing of the agreement. The 8,039 CTKRCSB shares were sold to the respondent as a last resort. With the injection of the RM270,000. CTKRCSB flourished in that as the learned judge stated, increased in the value of the shares. In view of the increase in value, the appellant refused to perform on the deal. According to the annual return of the company as on 27 September 1996 (p. 260) and at the time of the signing of the agreement there were only two other shareholders, the appellant's mother and his brother. There was no difficulty for the appellant to get their consent and we would not be wrong to say that the other two shareholders knew of the deal between the appellant and the respondent.

In respect of the 32,360 SHPSB shares which were deposited with the duly signed transfer forms deposited to the stakeholder as security, we are of the view that the appellant had obtained the necessary approval of the board of directors of SHPSB. Otherwise, the appellant would not be able to deposit those shares and the duly executed transfer forms. Thus, when the appellant delivered the shares and the duly executed transfer forms of the 32,630 SHPSB shares to the stakeholder, the stakeholder and the respondent accepted them as security being cleared of all hindrances.

It is in evidence that the appellant's holding in CTKRCSB had been reduced from 50% to 26.349% (exh. A) some time in 1997. Originally there were only three shareholders where the appellant was holding 50% of the shares. Some time in 1997, seven other people were allotted the shares belonging to the appellant and the other two shareholders. For that reason, the shareholding of the appellant was reduced from 50% to 26,349%. It is noted that out of the seven new shareholders two of them were not family members. The reason given

for allotting them the shares was that they have given financial assistance to the family's investment in Kilang Batu Bata Kian Hock Heng Sdn Bhd. Now, when the respondent paid RM270,000 for the 8,039 CTKRCSB shares, it is obvious to us that was financial assistance to CTKRCSB who have investment interest in Kilang Batu Bata Kian Hock Heng Sdn Bhd. As such we see no reason why he was not given the same treatment as the other two shareholders. It is also to be noted that the 8,039 CTKRCSB shares are less than the 26.349% shareholding of the appellant which he could have allotted to the respondent. We are of the view that the reason for the appellant not transferring the 8,036 CTKRCSB shares was not because approval could not be obtained but because the appellant wanted to contract out of the agreement.

The last issue raised by the appellant in the present appeal was the delay on the part of the respondent to apply for specific performance. In respect of this we have noted that, the agreement was executed on 16 December 1995. Under that agreement the appellant was given three months to obtain the necessary approval. According to the respondent, which was denied by the appellant, the appellant requested for a further period to obtain the approval which was agreed upon by the respondent. Reading the affidavit, we agreed with the learned judge that the extension was in fact given. The appellant kept silent after that and he did not have the courtesy to inform the respondent that he could not get the approval. The appellant was kept waiting with high hopes of getting the CTKRCSB shares. After waiting for some time and realising that the appellant would not be able to obtain the approval, on 6 May 1997 gave notice through the stakeholder to exercise the option under cl. 7(b). Under the agreement there are two time schedules, one the obtaining of the approval from the board of directors for the transfer of the CTKRCSB shares and the second the exercising of the option. For the approval, the appellant was given three months and an extension of three months to obtain the approval, which in our mind, had lapsed because it exceeded the time period given which was due some time in June 1996. The second time schedule was the exercising of the option which was dependent upon the first time schedule. In the second time schedule, we could not find any time period given to the respondent to exercise that option. In the absence of any time frame, we are of the view that it must be exercised within reasonable time period after the respondent was formally informed that the approval could not be obtained. It had come to the knowledge of the respondent that the approval was not forthcoming. The evidence shows that the appellant did not notify the respondent either in writing or orally that he could not keep the approval. He kept silent until 22 September 1997 when he responded to the notice of demand from the respondent's solicitors. That by implication was the first official notification that the approval could not be obtained. When the respondent, after waiting for so long and the approval was not forthcoming,

through the stakeholder gave notice on 6 May 1997 to exercise the option. In our opinion, taking into circumstances of the case, the respondent exercised the option within a reasonable time period. In this case we are not talking about the time period to get the approval but the time period for exercising the option which was to commence after approval could not be obtained. Looking at the evidence, the commencement of time period to exercise the option would formally be on 22 September 1997. That was the date when the appellant responded to the notice of demand from the respondent and enclosing a cheque for the refund of the RM270,000 which was not accepted by the appellant. Silence on the part of the appellant could not, in our view, be interpreted as notification that approval could not be obtained. Taking into consideration of the evidence before us we could not find any delay on the part of the respondent to apply for specific performance to enforce the option.

Even assuming that there was delay, we agree with the learned judge that the decision in *Yap Mang Siew & Ors v. Leong Hum* [1998] 3 CLJ Supp 513, applies. Looking at the circumstances and the evidence, we are of the opinion that equity would favour the respondent, in that the appellant should not take advantage of his own wrongdoing. From the evidence, we could infer that at the time when the agreement was executed, CTKRCSB was in need of fund and the appellant being the director and the main shareholder approached the respondent to get the RM270,000. It is obvious that he could not get a bank loan because the only asset, a land belonging to CTKRCSB was already charged to the bank. It is apparent to us the respondent was not willing to treat the RM270,000 as a loan. He paid the RM270,000 to purchase the CTKRCSB shares or if approval is not given to the appellant to sell those shares, then the option to purchase the SHPSB shares. The evidence shows that the respondent was more interested to purchase the CTKRCSB shares.

The respondent, cross-appealed against the decision of the trial judge in refusing to grant the order under prayer 1(b) for a direction that the company secretary of SHPSB register the 32,630 SHPSB shares in the name of the respondent. In refusing to grant that order the learned judge stated that the company secretary was not made a party to the present action. We have dismissed this cross-appeal earlier, but on perusing the record closely we felt that we are in error in dismissing the cross-appeal. As such we are of the opinion that the learned judge have erred in not granting that order.

It is true that the company secretary of SHPSB was not a party to the present action but, in our opinion, a company secretary should act according to the instructions of the board of directors. In the present appeal, we have noticed the appellant was at the material time the director and the controlling shareholder of SHPSB. Since the learned judge had made an order in respect

of prayer 1(a), that order is binding on SHPSB, the directors, shareholders and the officials of the company including the company secretary and to our mind, they should give effect to that order. In our view, the order prayed for in para 1(b) is consequential to the order given in para 1(a). In para 1(b), the respondent prayed for an alternative order in case the company secretary refused to register, ie, the senior assistant registrar of the court do register the name of the respondent as holding 32,630 SHPSB shares. This is somewhat similar to specific performance in respect of land matters where there are instances when the Registrars of Land Titles are not made parties to the action. Admittedly, we have made an error here, and the judgment should be brought to the attention of the court below so that the necessary registration could be done, when the respondent applies to take action against the company secretary. Since we have dismissed the cross-appeal in open court, that order stands.

The appeal is hereby dismissed with costs. The cross-appeal is also dismissed but with no order as to costs. The deposit paid by the appellant is to be paid to the respondent to account of taxed costs. The deposit (if any) paid by the respondent is to be refunded.

Subsequent to our decision, we were informed by the respondent, there was a stay order granted by the High Court pending the disposal of this appeal. The appellant did not make any application for stay before us. The order for stay granted by the High Court should therefore lapse. In our view, the stay should not in the first place be granted because the stay was only in respect of the registration of the respondent's name in the register. If the appellant is to succeed in his appeal to the Federal Court (if any), the name of the respondent would be removed from the register and the name of the appellant be reinstated. In that sense it does not make the subject matter of the appeal nugatory. The appellant might argue that with the registration, the respondent might change the stature of SHPSB. In our opinion, he would not be able to do, since he would only be the holder of 32,630 shares compared to the 72,509 shares paid up and issued. In our view, a stay could not be granted in the first place and if there is a stay it should be removed henceforth.